SUPREME COURT, U. S.

OCT 31 1968

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NO. 702

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

GEORGE LESLIE SAMUELS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CLEMENS PRINTING COMPANY - SAN ANTONIO, TEXAS

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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

George Leslie Samuels, petitioner, prays that a writ of certiorari issue to review the judgment entered in this case on August 5, 1968, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court did not file an opinion. The opinion of the Court of Appeals has not at the time of the writing of this petition been officially reported. However, a copy of such opinion is appended to this petition as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1968. The Petition for Rehearing was denied on October 2, 1968. A stay of the mandate was granted to and

including November 1, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Was it harmless constitutional error under the holding of *Chapman v. California,* 386 U.S. 18 (1967) for the Assistant United States Attorney during the criminal trial of petitioner for alleged tax evasion to comment on the petitioner's failure to testify?

(2) If the comment on the petitioner's failure to testify was a violation of a substantial constitutional right and was not harmless constitutional error could this right be waived by the petitioner under the holding of *O'Connor v. Ohio,* 385 U.S. 92 (1966)?

(3) May a United States District Judge under the holdings of this Court in *Alford v. United States,* 282 U.S. 687 (1931) and *Gordon v. United States,* 344 U.S. 414 (1953) limit cross examination of the Government's principal witness in a criminal trial in order not to allow the defense to show that such witness had previously sworn falsely and had no regard for his oath to tell the truth?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved is that portion of the Fifth Amendment to the Constitution of the United States which states, inter alia, that "No person . . shall be compelled in any criminal case to be a witness against himself . . ." Also involved is 18 U.S.C. §3481, 62 Stat. 833 which provides that:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in

any State, District, Possession or Territory, the person charged shall, at this own request, be a competent witness. His failure to make such request shall not create any presumption against him.

STATEMENT

1. On December 20, 1966, in the United States District Court for the Western District of Texas, the petitioner was convicted (R. 56)[1], under an indictment containing ten counts (R. 9), of violating Title 26 United States Code §7201 and Title 26 United States Code §7206(1) (Appendix B). Trial was to a jury and lasted seven days.

The peitioner, cognizant of his right not to testify under the Fifth Amendment to the Constitution of the United States and the protection provided by 18 U.S.C. §3481, elected not to testify in his own behalf. The Assistant United States Attorney in his final argument to the jury made a direct and adverse comment on the petitioner's election not to testify.

The comment occurred during that portion of the Government's final argument when a contrast was being drawn between the case presented by the prosecution and that presented by the petitioner. The argument began with a discussion of the "facts". The prosecutor first stated that "the best way" to try a case "is not to be afraid of the facts. Not to be afraid of the facts no matter what they are or who says them." (R. 1298). He proceeded to tell the jury that "The facts are here for you to see, and for you to consider." (R. 1298). It would not be necessary for the Government to tell the jury "what might have been or what could possibly have happened." (R. 1298). The Government could "refer

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[1] All "R" references are to the printed record in the court of appeals.

to the evidence and be proud that we brought it to you through all of the witnesses, and that we have satisfied the test." (R. 1298-1299). The jury was told by the Assistant United States Attorney that "I am proud to talk about the facts."

The defense, in comparison to the Government's case, was without the facts. The jury was twice told that the defense hoped that they would ". . . forget about the facts as they related to G. L. Samuels . . ." (R. 1299). The petitioner's case was characterized as confusing the issue, hiding the ball, talking "about supposition, innuendo, and insinuation." (R. 1299). While the Government was "proud to talk about the facts", "the last thing you want to talk about in defending a case is the facts." (R. 1299).

Finally, after reference to the Government's principal witness, Francis Kuemmel, the jury was told that "G. L. Samuels does not want to talk about the facts." (R. 1301). With this statement and in the context of its setting the comment on the defendant's failure to testify was made and harmful inferences drawn therefrom.

2. In the Government's opening statement the jury was informed that the two principal witnesses for the Government would be Mr. Francis Kuemmel and Mr. Luther Warrick. (R. 82). Special Agent Mattnys testified that almost all the alleged omitted income of the defendant was derived from transactions with Mr. Kuemmel. (R. 1044-1045). The evidence actually showed that the petitioner's alleged unreported income derived from transactions with Warrick were confined to only one year, 1958, in the amount of $5,945.40. (R. 34). Being the Government's principal witness the credibility of Francis Kuemmel was a paramount factor in the Government's case. Three witnesses testified that Mr.

Kummel had a bad reputation in the community for truth and veracity. (R. 1172-1176, 1182-1184, and 1185-1187). In order to impeach the credibility of Kuemmel, defendant's counsel on cross examination attempted to show that in a prior state court proceeding the witness had filed, on his own behalf. a sworn inventory which was knownly falsely sworn to. Defendant's counsel attempted to establish that in these proceedings Kuemmel had concealed assets and lied under oath. (R. 295-310). The trial judge ruled that this would be cross examination on a collateral matter and prevented defense counsel from attacking the credibility of the witness in this manner. The proposed cross examination was intended only as an attack upon the witness' credibility as it affected his obligations under an oath in a court of law.

REASONS FOR GRANTING THE WRIT

A. *Comment on failure to testify.* Both the framers of the Constitution and the Congress have erected a protection against comment being made and adverse inferences being drawn from a defendant's election not to testify in a criminal proceeding. Justice Black has stated that "Ordinarily, the effectuation of this protection is a relatively simple matter — *if the defendant chooses not to take the stand, no comment about his failure to testify is permitted.*" Many times and in many ways this Court has announced, expanded and reaffirmed this basic principal. *Wilson v. United States,* 149 U.S. 60 (1893); *Quinn v. United States,* 349 U.S. 155 (1950); *Ullman v. United States,* 350 U.S. 422 (1955); *Slocher v. Board of Higher Education,* 350 U.S. 551 (1955); *Grunewald v. United States,* 353 U.S. 391 (1957); *Griffin v. California,* 380 U.S. 609 (1965); *Chapman v. California,* 386 U.S. 18 (1967). But, as with all constitutional rights, the very simplicity of its statement gives rise to complexities

in its application. These complexities, explanations, and rationalizations which tend to dilute the privilege can best be done away with by a rule which declares that under no circumstances can a prosecutor comment on or draw inferences from a defendant's failure to testify. In truth this is the spirit behind the simple statement of the right.

The court of appeals in its opinion affirming the judgment of the district court adopted the Government's view that the comment was not plain error within the meaning of Rule 52(b) F.R.Cr.P.[2] and that any alleged error was waived by defense counsel's failure to make a timely objection during the argument itself[3]. In light of this Court's holdings in *Chapman v. California*, 386 U.S. 18 (1967) and *O'Connor v. Ohio*, 385 U.S. 92 (1966) both holdings of the court of appeals are error and require review by this Court in order to protect petitioner's constitutional right to a fair trial.

In *Chapman v. California*, 386 U.S. 18 (1967) this Court held that constitutional errors which affect the *substantial rights* of a defendant in a criminal action cannot be treated as harmless error. This Court then held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that is was harmless beyond a reasonable doubt."

The first question, therefore, to be decided here is whether the petitioner's right to silence and freedom from adverse comment and inferences is a substantial right. There can be but one answer to that question. *Chapman* itself was a

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2 Rule 52(b) F.R.Cr.P. provides that: "Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

3 Defense counsel did move for a mistrial on the ground of the comment immediately at the close of the Government's argument and before the verdict was returned and the objection was renewed in petitioner's motion for new trial. (R. 51).

case where the prosecution commented on the defendant's right to silence and such comment was held not to be harmless. In the recent case of *Anderson v. Nelson,* —— U.S. ——, 20 L.ed. 2d 81, 88 S.Ct. —— (1968) it was again held that adverse comment on the defendant's constitutional right not to testify was not harmless. In *White v. United States,* 314 F.2d 243 (Ct. App. D.C., 1962) interpreting Rule 52(b) of the F.R.Cr.P. the court held that ". . . it is beyond doubt that an accused is afforded a 'substantial right' in deciding whether or not to take the stand . . ." In *DeLuna v. United States,* 308 F.2d 140, 151 (5th Cir., 1962) the right to silence was referred to as "an absolute right". The action of this Court in extending the right to silence free from adverse comment to the States through the Fourteenth Amendment is indicative of the great constitutional importance of that right. *Griffin v. California,* 380 U.S. 609 (1965). Plainly petitioner had a clear and substantial right not to testify.

To determine the violation of the petitioner's right not to testify, examination must be made of the events and atmosphere as they occurred and existed in the trial court along with the context of the comment itself. The trial consumed a week during which both the case for the Government and the defense was vigorously presented to the jury. Time for argument came. The Government plainly portrayed itself to the jury as being the possessor of *the facts.* This was the theme of the Government's argument. Being "proud to talk about the facts" (R. 1299); not being "afraid of the facts" (R. 1298); having brought to the jury the evidence "through all of the witnesses" (R. 1298), the prosecutor obviously planted in the jury's mind the implication that the Government's case was based on "the facts". At the same time the defense was twice pictured as wanting the

jury to "forget about the facts as they relate to G. L. Samels." (R. 1299). Thus did the prosecution portray the defense:

> Let's confuse the issues. Let's hide the ball. Let's talk about supposition, innuendo, and insinuation. But the last thing you want to talk about ir defending a case is the facts. (R. 1299)

The distinction was clearly made — the Government had the facts, the petitioner did not. At this point it should be plain that this was the conclusion that the Government was attempting to drive home to the jury. Why did the Government have the facts and the defense have only supposition, innuendo, and insinuation? The Government supplied the answer to this unspoken but plainly obvious question — "G. L. Samuel does not want to talk about the facts." Such statement was a direct comment on the defendant's failure to take the stand, testify in his own behalf and "talk about the facts."

This Court stated in *Chapman,* supra, that "Petitioners are entitled to a trial free from the pressure of unconstitutional inferences" based on their elction not to testify. The unconstitutional inferences to be drawn from this argument are abundant and all were planted in the mind of the jury. If the facts were otherwise than presented by the Government would not G. L. Samuels talk about the facts; if the relationship between petitioner and the Government's principal witness was not as presented by the Government would not G. L. Samuels talk about the facts; if G. L. Samuels were innocent would he not talk about the facts. In essence the implication induced by the comment was that the defendant would not, because he could not, deny the facts as presented by the Government. An accused in a criminal trial has "an absolute right to silence" which carries with it "complete freedom from adverse comment and from

harmful presumptions (and inferences) based on assertion of the right." *DeLuna v. United States,* 308 F.2d 140 (5th Cir. 1962, cert. den.). That absolute right of the petitioner was plainly violated and harmful inferences could be the only result Thus petitioner's rights under the Fifth Amendment and 18 U.S.C. S3481 were denied and the result was an unfair trial.

It is clear that the Government's theme that its case was founded on "the facts" and that the last thing the defense wanted to talk about was the facts coupled with the comment that "G. L. Samuels does not want to talk about the facts" was "designed and calculated to make petitioner's version of the evidence worthless." *Chapman v. California,* supra. The comment was made, harmful constitutional inferences were drawn —the error must be held to be plain constitutional error and not harmless.

In *Chapman* this Court required that the beneficiary of a constitutional error "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." In this regard the court of appeals accepted the Government's argument that the comment was the product of inadvertance and mistake. Surely such an explanation does not meet the high standard set down in *Chapman.* Substantial constitutional errors cannot be accepted and condoned on the excuse that they were the product of mistake and inadvertance. Prosecutors cannot thus gain indirectly what they are prohibited from doing directly. Preservation of fundamental constitutional rights must depend on something more than the mistake theory. It is not the function of United States Attorney to make "mistakes" which benefit the Government while violating a defendant's right to a trial free from constitutional error. *Viereck v. United States,* 318 U.S. 236; *Berger v. United States,* 295 U.S. 78.

The entire tone of the Government's final argument shows that the Government was fully aware of what it was doing and the prejudice it was creating in the minds of the jurors. The prosecutor drew a prejudicial comparison between the supposed affluence of the petitioner and the monetary needs of the jurors and himself. (R. 1317). He equated a verdict of not guilty as one which would change the course of good government whereby the jury would tolerate tax fraud and give to the pititioner a set of laws different from all other citizens. (R. 1313-1314). He made a personal attack on petitioner's counsel and accused them of attempting to tamper with a Government witness. (R. 1312). He told the jury that the Government's cause was the cause of justice (R. 1312), implied that it was their "duty" to agree with the Government's version of the case and convict the defendant. (R. 1323). The entire argument, if considered in the heat and passion of a trial court, shows that the prosecutor was not subject to mistake but was prone to passion and prejudice in his quest for a conviction.

In holding that the error was waived by the lack of an objection during the argument itself, the court of appeals has misconstrued both the rationale of this Court in *O'Connor v. Ohio,* 385 U.S. 92 (1966) and the basic rule which does not require an objection to be made in order for appellate courts to correct plain constitutional errors. The holding of this Court in *O'Connor* indicates clearly that procedural niceties cannot become paramount over constitutional rights. The failure to object in *O'Connor* was not held to be a bar to the assertion of the petitioner's claim that his constitutional rights were violated by the prosecutor's comment on his failure to testify. Substantive constitutional rights must always stand above procedural rules.

This Court has held that it is not the duty of defense

counsel to magnify the error complained of by calling further attention to it. *Stewart v. United States*, 366 U.S. 1, 10 (1961). Also this Court has declared that ". . . appellate courts in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Socony-Vacucm Oil Co.*, 310 U.S. 150, 239 (1940); *United States v. Atkinson*, 297 U.S. 1959 (1936), Under the rationale of *O'Connor* and the rules controlling plain and fundamental error, the constitutional right of the defendant to be free from having adverse inferences drawn from his failure to testify was not waived by his failure to object during the Government's argument.

This Court has often had to face the question of whether the right to silence guaranteed by the Fifth Amendment has been violated. A clear, concise ruling that under *no* circumstances may a federal prosecutor comment or allude to a defendant's failure to testify, or draw harmful inferences therefrom, would settle the issue once and for all. Adroit prosecutors would know that they could not attempt to put before a jury that which is constituionally forbidden.[4] Petitioner hopes that this will be the result of his petition to this Court.

B. *Limitation of cross-examination.* Petitioner recognizes the rule that trial judges have latitude and discretion in their control of cross-examination. But there does exist certain well defined boundaries to that discretion. A more

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[4] If the lower court's opinion is allowed to stand its rationale will allow clever and adroit prosecutors to comment on a defendant's failure to testify or in some way call attention to it and later claim that it was all done through a mistake. In this regard it should be noted that in the present case immediately preceding the comment in question the prosecutor used the petitioner's name seven times in succession. It was clear he intended to name G. L. Samuels and no mistake should be attributed to that fact.

extensive cross-examination is allowed in criminal cases where the credibility and trustworthiness of the Government's principal witness is sought to be impeached. *Gordon v. United States*, 344 U.S. 414, 423 (1953).

The Government acknowledged that Mr. Francis Kuemmel was its principal witness. (R. 80-81). The extent of the transactions between the petitioner and Mr. Kuemmel reaffirmed this statement. (R. 1044-1045). The credibility of Kuemmel was clearly a vital factor in the Government's case. In order to destroy the presumption of credibility of this principal witness, defense counsel attempted to show that (1) he had sworn falsely in a prior state court proceeding in filing under oath a false inventory, and that (2) in these proceedings he had secreted assets and lied under oath. (R. 295-310). Such attempted cross-examinaton was solely for the purpose of attacking the credibility of the witness, to show his insensibility to the obligation of his oath to tell the truth, and not for the purpose of "opening up" the state proceeding. As stated, petitioner recognizes the discretion of the trial judge in this area. But as this Court stated in *Gordon*, supra, "this principal cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of a crucial testimony."

The rule always has been that collateral matters which directly involve the credibility of the witness, his honesty, and truthfulness, may be used to impeach him. *Segal v. United States*, 246 F.2nd 814 (8th Cir., 1957); *Simon v. United States*, 123 F.2d 80 (4th Cir., 1941); *United States v. Lawinski*, 195 F.2nd 1 (7th Cir., 1925). In *Lyda v. United States*, 321 F.2d 788 (9th Cir., 1963) the Government's witness was asked on cross-examination whether he had ever used any other names other than the one he was using at the time

of trial, such as on a tourist permit or registration in a motel. The court allowed cross-examination on such collateral matters by holding that the use of false names bore directly on the witness' veracity.

The court in *Lyda*, asked "If a man lies about his own name, might he not tell other lies?" Petitioner here asks if Mr. Kuemmel lied about his own affairs under oath might he not lie about the petitioner's affairs under oath? This Court has recognized in *Alford v. United States*, 282 U.S. 687 (1931) that trial courts are under no obligation "to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination properly invoked." It should be remembered that the Government characterized its case as one based upon "the facts". Those "facts" came principally from the testimony of Mr. Kuemmel. The petitioner should have been allowed to discredit Kuemmel's credibility through impeachment on cross-examination. The denial of this proposed impeachment gave strength to the alleged "facts" of the Government's case and denied petitioner one of the requisites of a fair trial.

CONCLUSION

Petitioner believes firmly that his case is one in which substantial constitutional rights have been violated which prevented him from receiving a fair trial. His right to silence was violated and harmful inferences planted in the minds of his jurors. The Government's case was allowed to stand without the petitioner having the opportunity to show that it was built upon the testimony of a man who lied under oath. Petitioner did not receive a fair trial.

The proper administration of justice in all future criminal trials requires that this Court, for the benefit of all future counts (R. 9), of violating Title 26 United States Code S7201 self . . ." Also involved is 18 U.S.C. S3481, 62 Stat. 833

defendants, set out and adopt a clear rule which would clearly prevent any future prosecutor from commenting on or alluding to a defendant's failure to testify. If this rule is not established cases like the present in which a defendant believing in his constitutional right to silence finds that right explained away will continue to plague appellate courts. For the future, everyone, prosecutors, judges and defendants must know that the right to silence is absolute.

For the reasons stated herein, petitioner prays that this Court grant this writ.

Respectfully submitted,

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APPENDIX
A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24482

GEORGE LESLIE SAMUELS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Western District of Texas

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(August 5, 1968)

Before RIVES, GEWIN and THORNBERRY, Circuit Judges.

GEWIN, Circuit Judge: George Leslie Samuels (appellant) was indicted, tried and convicted of various violations of the Internal Revenue Code. The ten count indictment, returned on March 8, 1965, by a federal grand jury in the San Antonio division of the United States District Court for the Western District of Texas, specifically charged him under five counts with violations of 26 U.S.C. § 7201 for wilfully attempting to evade

a large portion of income tax due by him and his wife, one count for each of the years 1958, 1959, 1960, 1961 and 1962. The other five counts of the indictment charged Samuels with violation of 26 U.S.C. § 7206(1) for wilfully subscribing a return containing a written declaration that it is made under the penalties of perjury, not believing the return to be true. A separate violation was charged for each of the five years 1958 through 1962 inclusive. Samuels entered a plea of not guilty and was tried before a jury. The trial lasted seven days. A verdict of guilty on all ten counts was returned and judgment of conviction was entered on December 20, 1966. Samuels received a sentence of eighteen months on each count, to run concurrently. A motion for a new trial was overruled and notice of appeal was timely filed on December 30, 1966. After a full and careful consideration of each of appellant's contentions, we affirm.

Appellant alleges that numerous errors were committed in the trial of the case which require us to reverse. Specifically, he contends that the prosecutor illegally commented on his failure to testify; the prosecutor's final argument was improper and prejudicial; the trial court erred in illegally limiting cross-examination, failing to properly charge on circumstantial evidence, admitting evidence, and overruling appellant's motion in arrest of judgment; and that a series of errors were committed in the course of the trial, the cumulative effect of which denied him a fair trial.

Although no attack is made upon the sufficiency of the evidence to support the judgment of conviction, it

is nonetheless necessary briefly to set forth the facts giving rise to this prosecution and the government's contentions with respect to such facts, in order to place appellant's objections in their proper factual context. G. L. Samuels was the president of Samuels Glass Company, a corporation, throughout the period in question. The company offices were located in San Antonio, Texas, and its business consisted of selling glass and aluminum in the San Antonio area as well as selling scrap metal to various iron and metal dealers. Annual sales approached $2,000,000.00. While the evidence was contradictory on certain points, it was such that the jury could have found, as contended by the prosecution, that the violations primarily resulted from certain special purchasing arrangements made between appellant and two of the company's customers — Francis Kuemmel and Luther Warrick. When these two customers purchased items such as automobile windshields from the Samuels Glass Company, they dealt with G. L. Samuels personally, making their payments directly to him in cash. Such payments were not recorded in the books and records of the Samuels Glass Company and were not reported as income by either appellant or the corporation during the period 1958 through 1962. A similar pattern of operation was also shown involving lesser amounts in other transactions conducted by Samuels.

The most serious of appellant's contentions concerns the charge that the Assistant United States Attorney who conducted the prosecution for the government made a direct comment upon his failure to testify

thereby violating his right to a fair and impartial trial. During the course of the trial Samuels did not take the stand to testify in his own behalf, but rather elected to exercise his rights under the Fifth Amendment to the United States Constitution and 18 U.S.C. §3481. During the early portion of the closing argument of the prosecutor, the statement was made that "G. L. Samuels does not want to talk about the facts." At the conclusion of the argument, defendant's counsel called the attention of the trial court to the remark in his motion for a mistrial, which motion was denied. Again in his motion for a new trial, defendant's counsel raised the issue. The motion for new trial was overruled. Appellant contends that both the plain meaning of the statement as well as the context in which it was made constituted a substantial and prejudicial violation of his right to a fair trial.

Under both the Fifth Amendment to the United States Constitution and 18 U.S.C. § 3481 it is clear that no comment is permissible on a defendant's failure to testify. Stewart v. United States, 366 U.S. 1, 6 L.ed.2d 84 (1961); Wilson v. United States, 149 U.S. 60, 37 L.ed. 650 (1893); DeLuna v. United States, 308 F.2d 140 (5 Cir. 1962). Such a comment is equally forbidden even though it is indirect. Benham v. United States, 215 F.2d 472 (5 Cir. 1954); DeMayo v. United States, 32 F.2d 472 (8 Cir. 1929).

The government's threshold defense of the comment under attack here is that there was a failure by the defense to make a timely objection. In support of this argument the government relies heavily on the case of Fogarty v. United States, 263 F.2d 201 (5 Cir. 1959).

That case also involved a contention that the attorney for the government had adverted to the defendant's failure to testify while making his closing argument to the jury. The court stated:

> ". . . no objection was made to the argument when made. It is not sufficient to move for a mistrial after all the arguments are in. The purpose of requiring objection to be made while the argument is in process is to give counsel making the argument a chance to withdraw or explain it and the court a chance to exclude it from the jury's consideration. The Rules requiring prompt objection and the assignment of reasons therefor are rules of reason and their observance should not be lightly disregarded." (Citations omitted). 263 F.2d 201 at 204.

Another case which strongly supports the government's position is Langford v. United States, 178 F.2d 48 (9 Cir. 1949). There the defendant was charged with a Mann Act violation, did not testify on his own behalf, and during the closing argument the attorney for the government stated: "Once again I want to direct your attention to the fact that the defendant was not on the stand. It seems to me that the least he could do would be to get on the stand and testify as to his occupation at this time or at the time when these acts were charged last spring." 178 F.2d at 53. No objection was made. The court stated that whether a defendant should be held to have waived the right to subsequently raise the objection (or whether such remark constituted "plain error") was dependent upon the "gravi-

ty of the error in the particular case — upon how flagrantly the rights of the accused have been disregarded." In the circumstances there present the court held that it would not treat the comment as plain error. In addition, the court added that had the trial court admonished the jury to disregard the remarks of counsel or given general instructions that no weight was to be given to defendant's refusal to testify, then any possible error would have been cured.

Despite the strenuous argument by appellant's counsel, we do not believe that the case of O'Connor v. Ohio, 385 U.S. 92, 17 L.ed.2d 189 (1966) forecloses all reliance on the many cases requiring prompt objection to comment on an accused's failure to testify. The *O'Connor* case involved a state prosecution for larceny. Subsequent to O'Connor's conviction, the Supreme Court decided Griffin v. California, 380 U.S. 609, 14 L.ed.2d 106 (1965) which applied the Fifth Amendment prohibition relative to comment on the accused's failure to testify to the states through the Fourteenth Amendment. The Supreme Court therefore remanded O'Connor's case to the Ohio Supreme Court in light of the *Griffin* decision. 382 U.S. 286, 15 L.ed.2d 337. Upon remand, the Ohio Supreme Court again affirmed the conviction. Their sole ground was that O'Connor had failed to make a timely objection to the illegal comment. 217 N.Ed.2d 685 (Ohio 1966). O'Connor again appealed to the Supreme Court which held that failure to object in the circumstances there present was no bar to a consideration of the constitutional claim since petitioner had already exhausted his state remedies at the time of the *Griffin* decision and therefore could not be held to have anticipated

the application of the Fifth Amendment to the states so as to be required to object. The Supreme Court carefully refrained from any all inclusive language which would obviate the necessity to object in all cases. Rather the court said:

> "We hold that *in these circumstances* the failure to object in the state courts cannot bar the petitioner from asserting this federal right. . . . Defendants can no more be charged with anticipating the Griffin decision than can the states . . . the failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." (Emphasis supplied) 385 U.S. at 93.

We construe the *O'Connor* decision not as foreclosing the issue of requiring a timely objection, but rather of reaffirming such a rule while carving out a specific exception to it. It is observed also that there was no question about the fact that the constitutional rule was violated by the prosecutor's remarks in *O'Connor*. The State did not even contest that fact.

In deciding whether or not an objection was made in a timely manner, we are loathe to require any strict and unalterable rule that one must always object to a comment upon the refusal of a defendant to testify at the precise moment such comment is made. However, in the circumstances of this case where no objection to the argument under consideration was made until after the argument was concluded, we decide that ap-

pellant's objection was not timely. Consequently, appellant can obtain relief only if the remark was so flagrant as to constitute plain error within the meaning of Rule 52(b), F.R.Cr.P.[1]

In determining whether the prosecutor's remark constitutes plain error, we must first consider whether the statement here in question was in fact a comment on the accused's failure to testify. In doing so we look to the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact upon the jury. Davis v. United States, 357 F.2d 438 (5 Cir. 1966).

The theme of the prosecutor's argument was that while he had attempted to try the case solely on the facts, Mr. Foster, the defense counsel, had relied on "supposition, innuendo, and insinuation" and employed the usual defense stratagem of attempting to shift the focus of the jury's attention from the defendant, Samuels, to the prosecution's witness, Kuemmel. In effect, he was contrasting his tactics in conducting the case with those of defense counsel. It was within this framework that the comment was made that "G. L. Samuels does not want to talk about the facts."[2]

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[1]Rule 52(b) provides:

> "Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

[2]The following are excerpts from the argument:

> "You know, when you try a case, it seems to me the best way to try it is not to be afraid of the facts no matter what they are or who says them. You sleep better, I think, when you try a case that way . . . .

This argument, viewed in its entirety, was not such that it can be said that the prosecutor's manifest intention was to comment upon the accused's failure to testify nor was it of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. United States v. Fay, 349 F.2d 957 (2 Cir. 1965). The context in which it was made indicates that the remark was

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Defending a lawsuit is a difficult task. I'm sure that's true. You do the best with what you have. If you don't have anything, ordinarily the best defense is a good offense. Expressed another way, let's try anybody except G. L. Samuels. Let's try anybody, except forget about the facts as they relate to G. L. Samuels. Let's try Francis Kuemmel. Let's try him in the hope that the jury will forget about the facts as they relate to G. L. Samuels, and convict Francis Kuemmel of something even though he is not on trial. Let's confuse the issues. Let's hide the ball. Let's talk about supposition, innuendo, and insinuation. But the last thing you want to talk about in defending a case is the facts.

I am proud to talk about the facts . . . I want to speak on the issues raised by the defense in defending this case.

I want to talk about Francis Kuemmel. . . .

Mr. G. L. Samuels chose this man — this awful fellow, this awful fellow — simply because he was a good customer and could come up with the cash when G. L. Samuels wanted it. Mr. Francis Kuemmel was good enough to do business with, he was good enough to pay G. L. Samuels and the Samuels Glass Company about a hundred and ten thousand dollars over a five-year period, but he is such a bad guy now. . . . And he was good enough to lend money to at interest. But he is such a bad guy now.

I don't think you are going to like that. If he was good enough then, he is good enough now. Except, G. L. Samuels does not want to talk about the facts.

Mr. Foster says, 'Let me tell you what could have happened. Mr. Kuemmel could have put some of this money in his own pocket.' "

directed to the argument of counsel and not to defendant's failure to testify. It is very possible that such comment was merely inadvertent and the prosecutor's intention was to use defense counsel's name rather than "G. L. Samuels". At the very least it can be said that the contested statement, taken in context, represents a borderline case as to whether there was any comment on defendant's refusal to testify at all.[3]

In addition to the lack of any flagrant emphasis on the remarks of the prosecutor, the court gave several curative instructions to the jury on this issue.[4] It is

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[3]After the verdict had been returned the district judge did state to the attorneys that "it is evident to the Court that he [the Assistant United States Attorney, Mr. Jefferson] was referring to Mr. Foster, an inadvertent error, so that the Court didn't regard it as anything significant, because he immediately began to refer to Mr. Foster. . . ." As a witness to the argument and a participant in the proceedings we feel the district judge's comments are entitled to great weight on the issue of the manifest intention which prompted the comment and its natural and necessary impact on the jury.

[4]The court, as a part of its charge to the jury instructed that:

> "The law does not require a defendant in a criminal case to take the stand and testify. In the present case the defendant elected not to take the stand and testify. You are instructed that such fact is not to weigh against the defendant in the slightest degree and that no inference of any kind is to be drawn against him because of such fact. You are further instructed that you are not to discuss that matter during your deliberations."

In addition, before arguments the court instructed the jury as follows:

> "You are informed that the statements made by counsel during the arguments are not evidence. It is their views of the evidence it is not permissible and it is improper for counsel to give their own personal views as to the guilt or innocence of the defendant, because it might

clear that in extreme cases it would be unrealistic to believe that instructions to the jury, however phrased, can remove the prejudicial effects of a constitutional error and courts have so stated. DeLuna v. United States, 308 F.2d 140 (5 Cir. 1962). Krulewitch v. United States, 336 U.S. 440 (concurring opinion of Justice Jackson at 453). This principle is limited, however, to cases where the effect of the error is so great as to be impossible of erasure. Thus, in *DeLuna*, supra, the court vividly described the extreme circumstances as follows:

> "The court's instructions were intended, of course, to neutralize the effect of the comments. But considering the head-on collision between

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be assumed they had information not presented to you. So, when they make statements to you, you will regard it as though they had prefaced each statement with 'as shown by the evidence,' and that is all they are arguing is what is shown by the evidence, unless it should clearly appear that they are trying to state something of their own knowledge. So, counsel will notice, you won't have to keep saying 'assumed by the evidence' and not any of your personal beliefs."

After all argument was concluded the court further charged the jury that:

"Statements made by the attorneys in their opening statements or in their jury arguments are not evidence in the case and are not to be considered by you as such. Any such statements are the views of the attorneys as to what will be or has been established by the evidence of the case. Other statements made by the attorneys during the course of the trial which are not in the nature of stipulations are not to be considered by you as evidence in the case. The evidence in the case consists of the testimony of the witnesses, the exhibits admitted into evidence by the Court, and the stipulations of the attorneys."

> the two defendants, the repetition of the comments, and the extended colloquy over the comments between the trial judge and the lawyers, the imputation of guilt to DeLuna was magnified to such an extent that it seems unrealistic to think any instruction to the jury could undo the prejudicial effects of the reference to DeLuna's silence."

No such circumstances exist in the instant case. The comment here under attack was unexceptional and wholly lacking in aggravation and emphasis. The facts and circumstances of this case present a typical example of the kind of case where prompt objections and curative instructions have their highest and best use.[8]

Because of our view of all of the above circumstances attending the comments to which appellant objects, we are unable to discover any reasons which dictate a ruling that such comments constituted plain error within the meaning of Rule 52(b), F.R.Cr.P. Even were we to conclude that a prompt objection had been made, our analysis of the applicable law would not differ. The same circumstances which lead us to the conclusion that there was no plain error would also dictate a ruling that the prosecutor's comment did not constitute

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[8]It should be noted that the test for determining whether a comment on a defendant's failure to testify can be treated as harmless error is closely related to the test for determining whether a timely objection was required or whether such comment can be cured by trial court instructions. Such determinations turn on whether the comment was extensive and stressed to the jury, and whether the evidence of guilt was great. Anderson v. Nelson, ——— U.S. ———, 20 L.ed.2d 81 (1968).

an invasion of appellant's right against self-incrimination. We thus hold that the prosecutor's comments are not of such a nature as to constitute reversible error.

Appellant also lodges numerous objections to other allegedly improper and prejudicial comments made by the Assistant United States Attorney during the course of his closing argument to the jury. We have read the argument closely, but do not feel that it was improper or prejudicial. Meaux v. United States, 387 F.2d 370 (5 Cir. 1968), cert. den. __ U.S. __, 20 L.ed.2d 284 (1968). No objection was interposed to many of the comments, nor were the comments of such kind and character as to constitute plain error. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L.ed. 1129 (1940). In addition most of these comments were well within the range of fair argument or constituted the prosecutor's fair response to matters provoked or invited by the argument of defense counsel. Del Cristo v. United States, 327 F.2d 208 (5 Cir. 1964); Isaacs v. United States, 301 F.2d 706, 738 (8 Cir. 1962); Taylor v. United States, 279 F.2d 10, 12 (5 Cir. 1960). We agree with the appellant that the argument of the prosecutor was extremely effective, but we fail to find anything in it so improper or prejudicial as to require reversal.

Appellant further contends that the trial court committed error in limiting the cross-examination of one of the government's principal witnesses, Francis Kuemmel. There is no doubt that the testimony of Kuemmel was a vital factor in the government's case and that the defendant was entitled to a full and com-

plete cross-examination of him in order to impeach his credibility or attack him in any other legitimate manner. Gordon v. United States, 344 U.S. 414 (1953). In this case there was vigorous cross-examination of Kuemmel, and the objection of appellant is only that he was not allowed to cross-examine as to an allegedly false sworn inventory filed by Kuemmel in a prior state court divorce proceeding. However, the matter of certain alleged concealments of property by Kuemmel by using the names of other persons was allowed. As the Supreme Court stated in Alford v. United States, 282 U.S. 687, 694 (1931): "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court." Here, the district court permitted reasonable cross-examination on the question of concealment of assets by Kuemmel. In fact, the mention of the divorce in this context made it apparent that concealment took place in connection with such divorce. A full reading of the transcript of the cross-examination convinces us that the trial court did not abuse its discretion in relation to the scope of the inquiry. Harris v. United States, 371 F.2d 365 (9 Cir. 1967).

There remains one final contention of appellant that deserves some comment. He alleges that the trial judge failed to follow this circuit's test in cases where the evidence of guilt is solely circumstantial, and refused to apply such test in his charge to the jury. The test for which appellant contends is that the jury must be charged that a finding of guilt beyond a reasonable doubt in cases where only circumstantial evidence is introduced can only be returned if the jury might rea-

sonably find that such evidence excluded every reasonable hypothesis except that of guilt. Riggs v. United States, 280 F.2d 949 (5 Cir. 1960); Panci v. United States, 256 F.2d 308 (5 Cir. 1958). In this case the conviction is supported both by direct and circumstantial evidence and in such cases it is not error to refuse to give a charge on circumstantial evidence. Barshup v. United States, 191 F.2d 286 (5 Cir. 1951), cert. den. 342 U.S. 920. The jury was correctly charged on reasonable doubt.[6] In the circumstances revealed by the record in this case the district court was not in error in refusing the requested charge. Holland v. United States, 348 U.S. 121, 99 L.ed. 150 (1955).

Appellant's other contentions that certain other comments of the prosecutor were improper, that the manner of presenting certain exhibits was argumentative and invaded the province of the jury, and that the cumulative effect of all the errors committed by the court below prevented him from receiving a fair trial, all are without merit. We have given full consideration

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[6]Instruction No. 4 given by the court reads:

> "You have been instructed in other instructions that the Government must establish the guilt of the defendant beyond a reasonable doubt. A reasonable doubt of guilt means a doubt founded upon reason. It means a doubt which, without being sought after, fairly and naturally arises in your mind after a fair and candid consideration of all the evidence or lack of evidence. It does not mean a forced or strained or unnatural doubt. It is not a doubt based upon whim, or caprice, or sentimentality or sympathy. Proof of guilt to a mathematical certainty or beyond the possibility of a doubt is not required. Proof of guilt is sufficient if it establishes guilt to a moral certainty. Such proof is not sufficient if it does not so establish guilt."

to all of appellant's contentions, individually and collectively, and we find no error in the record. "A defendant is entitled to a fair trial but not a perfect one." Lutwak v. United States, 344 U.S. 604, 619; Steele v. United States, 243 F.2d 712, 715 (5 Cir. 1957).

JUDGMENT AFFIRMED.

United States Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM 1968

No. 24482

D. C. Docket No. CR. 22756

GEORGE LESLIE SAMUELS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Texas

Before RIVES, GEWIN and THORNBERRY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, George Leslie Samuels, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 5, 1968

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Edward W. Wadsworth, Clerk

No. 24482

GEORGE LESLIE SAMUELS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Texas

(October 2, 1968)

ON PETITION FOR REHEARING

Before RIVES, GEWIN and THORNBERRY, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

APPENDIX B
Title 26 U. S. C.

§7201. *Attempt to evade or defeat tax*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c.736,68A Stat. 851.

§7206(1). *Fraud and false statements*

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . August 16, 1954, c.736,68A Stat. 852.